



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96948; File No. SR-OCC-2023-001]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Update The Options Clearing Corporation's Operational Loss Fee Pursuant to Its Capital Management Policy

February 17, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 7, 2023, The Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii)³ of the Act and Rule 19b-4(f)(2)⁴ thereunder so that the proposal was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would revise OCC's schedule of fees to update the maximum contingent Operational Loss Fee listed in OCC's schedule of fees in accordance with OCC's Capital Management Policy. Proposed changes to OCC's

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

schedule of fees are included as Exhibit 5 to File Number SR-OCC-2023-001. Material proposed to be added to OCC's schedule of fees as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.⁵

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of this proposed rule change is to revise OCC's schedule of fees to update the maximum aggregate Operational Loss Fee that OCC would charge Clearing Members in equal shares in the unlikely event that OCC's shareholders' equity ("Equity") falls below certain thresholds defined in OCC's Capital Management Policy.

The proposed fee change is designed to enable OCC to replenish capital to comply with Rule 17Ad-22(e)(15) under the Exchange Act, which requires OCC, in pertinent part, to "hold[] liquid net assets funded by equity to the greater of either (x) six months . . . current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations

⁵ OCC's By-Laws and Rules can be found on OCC's public website: <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

and service”⁶ and “[m]aintain[] a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required.”⁷ The proposed rule change would implement a change in the maximum contingent Operational Loss Fee listed in OCC’s schedule of fees in accordance with OCC’s Capital Management Policy.

OCC’s Capital Management Policy includes OCC’s replenishment plan.⁸ Pursuant to the Capital Management Policy, OCC would charge an Operational Loss Fee in equal shares to Clearing Members to raise additional capital should OCC’s Equity, less the Minimum Corporate Contribution,⁹ fall below certain defined thresholds relative to OCC’s Target Capital Requirement (i.e., a “Trigger Event”), after first applying the unvested balance held in respect of OCC’s Executive Deferred Compensation Program.¹⁰ Based on the Board-approved Target Capital Requirement for 2023 of \$303 million, a Trigger Event

⁶ See 17 CFR 240.17Ad-22(e)(15)(ii).

⁷ See 17 CFR 240.17Ad-22(e)(15)(iii).

⁸ See Exchange Act Release No. 88029 (Jan. 24, 2020), 85 FR 5500 (Jan. 30, 2020) (File No. SR-OCC-2019-007) (“Order Approving OCC’s Capital Management Policy”).

⁹ The Minimum Corporate Contribution is defined in the Capital Management Policy as the minimum level of OCC’s own funds maintained exclusively to cover credit losses or liquidity shortfalls, the level of which the OCC’s Board of Directors (“Board”) shall determine from time to time. See Exchange Act Release No. 92038 (May 27, 2021), 86 FR 29861, 29862 (June 3, 2021) (File No. SR-OCC-2021-003). For 2023, the Board has approved a Minimum Corporate Contribution of \$69 million. When combined with the unvested funds held in respect of OCC’s Executive Deferred Compensation Plan contributed after January 1, 2020 (the “EDCP Unvested Balance,” as defined in OCC’s Rules), OCC’s persistent minimum level of skin-in-the-game for 2023 would be at least \$76 million, or 25% of OCC’s Target Capital Requirement. In addition to this minimum level, OCC would also contribute liquid net assets funded by equity greater than 110% of the Target Capital Requirement. See OCC Rule 1006(e).

¹⁰ See Exchange Act Release No. 91199 (Feb. 24, 2021), 86 FR 12237, 12241 (Mar. 2, 2021) (File No. SR-OCC-2021-003) (amending OCC’s replenishment plan, including the measurement for a Trigger Event, to account for the establishment of OCC’s persistent minimum skin-in-the-game).

would occur if OCC's Equity less the Minimum Corporate Contribution falls below \$272.7 million at any time or below \$303 million for a period of 90 consecutive calendar days.

In the unlikely event those thresholds are breached, OCC would charge an Operational Loss Fee in an amount to raise Equity to 110% of OCC's Target Capital Requirement, up to the maximum Operational Loss Fee identified in OCC's schedule of fees less the amount of any Operational Loss Fees previously charged and not refunded.¹¹ OCC calculates the maximum aggregate Operational Loss Fee based on the amount determined by the Board to be sufficient for a recovery or orderly wind-down of critical operations and services ("RWD Amount"),¹² which is determined based on the assumptions in OCC's Recovery and Orderly Wind-Down Plan ("RWD Plan").¹³ In order to account for OCC's tax liability for retaining the Operational Loss Fee as earnings, OCC may apply a tax gross-up to the RWD Amount ("Adjusted RWD Amount") depending on whether the operational loss that caused OCC's Equity to fall below the Trigger Event thresholds is tax deductible.¹⁴

The RWD Amount and, in turn, the Adjusted RWD Amount are determined annually based on OCC's corporate budget, the assumptions articulated in the RWD Plan,

¹¹ See Order Approving OCC's Capital Management Policy, 85 FR at 5503.

¹² Id.

¹³ The RWD Plan states OCC's basic assumptions concerning the resolution process, including assumptions about the duration of the resolution process, the cost of the resolution process, OCC's capitalization through the resolution process, the maintenance of Critical Services and Critical Support Functions, as defined by the RWD Plan, and the retention of personnel and contractual relationships. See Exchange Act Release No. 83918 (Aug. 23, 2018), 83 FR 44091, 44094 (Aug. 29, 2018) (File No. SR-OCC-2017-021).

¹⁴ See Order Approving OCC's Capital Management Policy, 85 FR at 5503.

and OCC's projected effective tax rate.¹⁵ The current Operational Loss Fee listed in OCC's schedule of fees is the Adjusted RWD Amount calculated based on OCC's 2022 corporate budget. Budgeted operating expenses in 2023 are higher than the 2022 budgeted operating expenses. This proposed rule change would revise the maximum Operational Loss Fee to reflect the Adjusted RWD Amount based on OCC's 2023 budget,¹⁶ as follows:

| Current Fee Schedule | Proposed Fee Schedule |
|---|---|
| \$157,000,000.00 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charged. | \$174,000,000.00 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charged. |

Since the allocation of the Operational Loss Fee is a function of the number of Clearing Members at the time of the charge, the maximum Operational Loss Fee per Clearing Member is subject to fluctuation during the course of the year. However, if the proposed Operational Loss Fee were charged to 111 Clearing Members, the number of Clearing Members as of December 13, 2022, for example, the maximum Operational Loss Fee per Clearing Member would be \$1,567,568.

OCC would also update the schedule of fees to reflect the levels of Equity at which OCC would charge the Operational Loss Fee according to the thresholds defined in the Capital Management Policy, as well as the level of Equity at which OCC would limit the Operational Loss Fee charged, based on OCC's current Target Capital Requirement.¹⁷ Consistent with OCC's approach to its persistent minimum skin-in-the-

¹⁵ See Order Approving OCC's Capital Management Policy, 85 FR at 5501 n.20, 5503.

¹⁶ Confidential data and analysis evidencing the calculation of the Adjusted RWD Amount based on OCC's 2023 corporate budget is included in Exhibit 3 to File Number SR-OCC-2023-001.

¹⁷ OCC does not propose any change to the thresholds and limits defined in the Capital Management Policy. This proposed change merely conforms the

game, the threshold in the schedule of fees continues to reflect that consistent with OCC's Capital Management Policy, the Trigger Event threshold is measured against Equity less the Minimum Corporate Contribution.

OCC proposes the fee change to be effective immediately upon filing, because the Board approved the Adjusted RWD Amount upon which the Operational Loss Fee is based for 2023. Notwithstanding the immediate effectiveness, OCC would not make the fee change operative until after the time required to self-certify the proposed change with the Commodity Futures Trading Commission ("CFTC").

(2) Statutory Basis

OCC believes the proposed rule change is consistent with the Act¹⁸ and the rules and regulations thereunder. In particular, OCC believes that the proposed fee change is also consistent with Section 17A(b)(3)(D) of the Act,¹⁹ which requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. OCC believes that the proposed fee change is reasonable because it is designed to replenish OCC's Equity in the form of liquid net assets as a component of OCC's plan to replenish its capital in the event that OCC's Equity, less the Minimum Corporate Contribution reserved as the primary portion of OCC's minimum persistent skin-in-the-game, falls close to or below its Target Capital Requirement so that OCC can continue to meet its obligations as a systemically important financial market utility ("SIFMU") to Clearing Members and the general public should operational losses materialize (including through a recovery or orderly wind-down of critical operations and

disclosure in OCC's schedule of fees to the current amounts based on the Board-approved Target Capital Requirement of \$303 million.

¹⁸ 15 U.S.C. 78a et seq.

¹⁹ 15 U.S.C. 78q-1(b)(3)(D).

services) and thereby facilitate compliance with Rule 17Ad-22(e)(15)(iii).²⁰ The maximum Operational Loss Fee is sized to ensure that OCC maintains sufficient liquid net assets to support its RWD Plan and imposes a contingent obligation on Clearing Members that is approximately the same amount as a Clearing Member's contingent obligation for Clearing Fund assessments for a Clearing Member operating at the minimum Clearing Fund deposit.²¹ Therefore, OCC believes the proposed maximum Operational Loss Fee sized to OCC's Adjusted RWD Amount is reasonable.

OCC also believes that the proposed Operational Loss Fee would result in an equitable allocation of fees among its participants because it would be equally applicable to all Clearing Members. As the Commission has recognized, OCC's designation as a SIFMU and its role as the sole covered clearing agency for all listed options contracts in the U.S. makes it an integral part of the national system for clearance and settlement, through which "Clearing Members, their customers, investors, and the markets as a whole derive significant benefit . . . regardless of their specific utilization of that system."²² Neither the SEC nor OCC has observed any correlation between measures of Clearing Member utilization or OCC's benefit to Clearing Members²³ and its risk of operational loss.²⁴ As a result, OCC believes that the proposed change to OCC's fee

²⁰ 17 CFR 240.17Ad-22(e)(15)(iii).

²¹ A Clearing Member operating at the minimum Clearing Fund deposit (\$500,000) could be assessed up to an additional \$1 million (the minimum deposit, assessed up to two times), for a total contingent obligation of \$1.5 million. See OCC Rule 1006(h).

²² See Order Approving OCC's Capital Management Policy, 85 FR at 5506.

²³ Id. ("The Commission is not aware of evidence demonstrating that those benefits are tied directly or positively correlated to an individual Clearing Member's rate of utilization of OCC's clearance and settlement services.")

²⁴ Id. (rejecting an objection to the equal allocation of the proposed Operational Loss Fee based on the SEC's regulatory experience and OCC's analyses of Clearing Member utilization (e.g., contract volume) or credit risk (e.g., Clearing Fund size) and the various operational and general business risks that could

schedule provides for the equitable allocation of reasonable fees in accordance with Section 17A(b)(3)(D) of the Act.²⁵

In addition, OCC believes that the proposed rule change is consistent with Rule 17Ad-22(e)(15)(iii), which requires that OCC establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage OCC's general business risk, including by maintaining a viable plan, approved by the Board and updated at least annually, for raising additional equity should its equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii).²⁶ While Rule 17Ad-22(e)(15)(iii) does not by its terms specify the amount of additional equity a clearing agency's plan for replenishment capital must be designed to raise, the SEC's adopting release states that "a viable plan generally should enable the covered clearing agency to hold sufficient liquid net assets to achieve recovery or orderly wind-down."²⁷ OCC sets the maximum Operational Loss Fee at an amount sufficient to raise, on a post-tax basis, the amount determined annually by the Board to be sufficient to ensure recovery or orderly wind-down pursuant to the RWD Plan.²⁸ Therefore, OCC believes the proposed change to OCC's schedule of fees is consistent with Rule 17Ad-22(e)(15)(iii) and the guidance provided by the SEC in the adopting release.

trigger an Operational Loss Fee). To date, OCC has observed no correlation between Clearing Member utilization or credit risk and OCC's potential risk of operational loss. See Confidential Exhibit 3.

²⁵ 15 U.S.C. 78q-1(b)(3)(D).

²⁶ 17 CFR 240.17Ad-22(e)(15)(iii).

²⁷ Standards for Covered Clearing Agencies, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70836 (Oct. 13, 2016) (File No. S7-03-14).

²⁸ See Order Approving OCC's Capital Management Policy, 85 FR at 5510 ("The Operational Loss Fee would be sized to the Adjusted RWD Amount, and therefore would be designed to provide OCC with at least enough capital either to continue as a going concern or to wind-down in an orderly fashion.")

OCC also believes that the proposed fee change is consistent with Section 19(g)(1) of the Act,²⁹ which, among other things, requires every self-regulatory organization to comply with its own rules. OCC filed its Capital Management Policy as a “proposed rule change” within the meaning of Section 19(b) of the Act,³⁰ and Rule 19b-4 under the Act.³¹ The Capital Management Policy specifies that the maximum Operational Loss Fee shall be the Adjusted RWD Amount.³² Because the Adjusted RWD Amount will change annually based, in part, on OCC’s corporate budget, fee filings are necessary to ensure that the maximum Operational Loss Fee in OCC’s schedule of fees remains consistent with the amount identified in the Capital Management Policy. In addition, the amounts associated with the thresholds at which OCC would charge the Operational Loss Fee and the limit to the amount would change in accordance with the Capital Management Policy are determined based upon the level at which the Board sets OCC’s Target Capital Requirement. Consequently, OCC seeks to amend the amounts identified in the schedule of fees to reflect OCC’s current Target Capital Requirement and OCC’s current Capital Management Policy, which reflects the establishment of the Minimum Corporate Contribution.³³ Therefore, OCC believes that the proposed change to OCC’s fee schedule is consistent with Section 19(g)(1) of the Act.

(B) Clearing Agency’s Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act³⁴ requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the

²⁹ 15 U.S.C. 78s(g)(1).

³⁰ 15 U.S.C. 78s(b).

³¹ 17 CFR 240.19b-4.

³² Order Approving OCC’s Capital Management Policy, 85 FR at 5503.

³³ See supra notes 9 and 10, and accompanying text.

³⁴ 15 U.S.C. 78q-1(b)(3)(I).

purposes of the Act. OCC does not believe that the proposed rule change would have any impact or impose a burden on competition. Although the proposed Operational Loss Fee affects Clearing Members, their customers, and the markets that OCC serves, OCC believes that the proposed increase in the Operational Loss Fee would not disadvantage or favor any particular user of OCC's services in relationship to another user because the proposed Operational Loss Fee would apply equally to all Clearing Members. In addition, OCC does not believe that the proposed Operational Loss Fee imposes a significant burden on smaller firms because the maximum Operational Loss Fee imposes a contingent obligation on Clearing Members that is approximately the same amount as a Clearing Member's contingent obligation for Clearing Fund assessments for a Clearing Member operating at the minimum Clearing Fund deposit.³⁵ Accordingly, OCC does not believe that the proposed rule change would have any impact or impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii)³⁶ of the Act, and Rule 19b-4(f)(2)

thereunder,³⁷ the proposed rule change is filed for immediate effectiveness as it constitutes a change in fees charged to OCC Clearing Members. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is

³⁵ See supra note 21.

³⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁷ 17 CFR 240.19b-4(f)(2).

necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.³⁸

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-OCC-2023-001 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-OCC-2023-001. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for

³⁸ Notwithstanding its immediate effectiveness, implementation of this rule change will be delayed until this change is deemed certified under CFTC Regulation 40.6.

website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-OCC-2023-001 and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁹

Sherry R. Haywood,

Assistant Secretary.

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³⁹ 17 CFR 200.30-3(a)(12).